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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-65

JEROME DALY,

Petitioner,

vs.

N. T. WALDOR, Commissioner of Highways of Minnesota; JOHN McCARTHY, Clerk of the Supreme Court of Minnesota; and STATE OF MINNESOTA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Minnesota (Petition, pp. 16-17) is reported at 207 N.W. 2d 541 (Minn. 1973).

The statute involved, the Minnesota "implied consent" law, Minn. Stat. § 169.123 (1969), is set forth in full in the Appendix hereto. The petitioner's petition, erroneously, sets out the provisions of Minn. Stat. § 169.123 (1971), (Petition, pp. 2-6). There are material differences between the 1969 and 1971 versions of subdivisions 1 and 2 of the statute due to amendments to it by the 1971 session of the Minnesota Legislature. The petitioner's driver's license was revoked pursuant to the 1969 version.

QUESTIONS PRESENTED

Does Minnesota's implied consent law violate article one or amendments four, five or fourteen of the United States Constitution?

STATEMENT OF THE CASE

This proceeding was commenced by the petitioner in the state courts of Minnesota to review the proposed revocation of his driver's license, for his alleged failure to submit to a chemical test of his blood after his arrest for "driving under the influence of an alcoholic beverage."

Briefly, the facts leading to this litigation include the following circumstances.

On March 13, 1970, petitioner was apprehended by a member of the Savage, Minnesota, Police Department. The officer had observed petitioner driving a motor vehicle erratically within the Village. After petitioner was stopped, the officer observed petitioner's physical appearance and condition and determined that petitioner was intoxicated. Petitioner was arrested for "driving under the influence of an alcoholic beverage", in alleged violation of Minn. Stat. § 169.121 (1969).

Petitioner, after his arrest, was transported immediately to the county jail in Shakopee, Minnesota, a distance of about eight miles. At the jail, petitioner was requested by the arresting officer to give a sample of blood or urine for testing to determine the alcohol content of his blood. The officer explained to petitioner what the consequences would be for his driver's license should he refuse; the petitioner, then an attor-

ney, was well aware of these consequences. The petitioner chose not to take a chemical test on that occasion.

Subsequently, the Minnesota Commissioner of Highways informed petitioner that his driver's license would be revoked for the refusal to permit a chemical test. The notice of revocation was mailed to petitioner March 23, 1970; on April 13, 1970, a hearing was requested, automatically staying the proposed revocation.

On January 14, 1971, a court trial was held in the Municipal Court of the City of Shakopee, pursuant to Minn. Stat. § 169.123, Subd. 6 (1969). The Municipal Court sustained the order of revocation. On February 10, 1971, the matter was appealed by petitioner to the District Court of Scott County for a *de novo* proceeding.

The District Court, Minnesota's lowest court of general jurisdiction, heard the matter December 8, 1971, in a jury proceeding, pursuant to Minn. Stat. § 169.123, Subd. 7 (1969). Based upon the jury's verdict, the District Court sustained the revocation of petitioner's driver's license. Petitioner thereupon took an appeal to the Minnesota Supreme Court, which also ruled adversely to him, on May 18, 1973. Rehearing was denied on May 31, 1973, and soon thereafter petitioner's driver's license was finally revoked.

ARGUMENT

Implied consent laws similar to Minnesota's presently exist in all fifty states.[1] Nonetheless, the petitioner purports to attack the statute on a number of federal constitutional grounds, alleging that, *inter alia:*

A. The statute is repugnant to the provisions of the fourth amendment to the United States Constitution, as it authorizes an unlawful search for and seizure of evidence;

B. The statute violates the prohibition contained in the fifth amendment to the United States Constitution against compelled self-incrimination;

C. The statute constitutes a bill of attainder, proscribed by Article I, Section 10, of the United States Constitution;

D. The statute denied petitioner due process of law, and equal protection of the laws, in contravention of the fourteenth amendment to the United States Constitution.

These contentions will be considered in turn.[2]

A.

A specimen of blood, or other bodily substance, may be taken incident to a lawful arrest for purposes of analyzing alcohol content consistent with the limitations of the fourth amendment. *Schmerber v. California*, 384 U.S. 757 (1966); *Breithaupt v. Abram*, 352 U.S. 432 (1957).

A mere reading of the Minnesota implied consent statute demonstrates that, in Minnesota, when a driver consents to give a sample of his blood, breath or urine such a sample is taken via a careful and reasonable procedure, unoffensive to dignity. Such tests are volitional and if the driver refuses to

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[1] Implied Consent Legislation, *Law Enforcement Legislative Research Digest* [Compilation No. 6, 1972 edition], International Association of Chiefs of Police, Inc., Gaithersburg, Maryland.

[2] Petitioner presents fourteen alleged arguments against the statute, on pages six and seven of his petition. We have responded only to those which, arguably, merit some discussion.

permit sampling, it is not done. *C.f., Rochin v. California*, 342 U.S. 165 (1952).

For the foregoing reasons, the statute is not repugnant to the fourth amendment.

B.

The protection afforded an accused by the fifth amendment to the United States Constitution applies only to "testimonial utterances." *Miranda v. Arizona*, 384 U.S. 436 (1966). After *Miranda*, this Court determined that an analysis of blood taken from an individual for the purpose of determining its alcohol content was not a "testimonial utterance." See *Schmerber v. California*, 384 U.S. 757 (1966). Thus, petitioner's claim that the Minnesota statute violates the fifth amendment is groundless. Evidence obtained by chemical testing under the statute is no more constitutionally offensive, for fifth amendment purposes, than that obtained by requiring an individual in custody to be fingerprinted or photographed or to give a specimen of handwriting. See the comments of Mr. Chief Justice Burger in *California v. Byers*, 402 U.S. 424, 431-32 (1971).

C.

Petitioner's claim that the implied consent law constitutes a bill of attainder is utterly frivolous. As our Supreme Court said, in its opinion below, "A bill of attainder is a legislative act which inflicts punishment . . . without a judicial trial." It is created only in instances where the legislature, in addition to its legitimate function, exercises the power of the judiciary and, by legislative act, pronounces the guilt of a party, without the safeguards of trial. *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 (1867).

A person refusing a test, under the Minnesota statute, is entitled to judicial review of any subsequent revocation of his driver's license. Minn. Stat. § 169.123, Subd. 5-7 (1969). In fact, a refusal of the test is permitted if the individual had any "reasonable grounds" to do so. *Id.*, Subd. 6.

There can be no serious or colorable claim that the Minnesota act constitutes a bill of attainder.

D.

We have extreme difficulty discerning in exactly what fashion the Minnesota statute, in petitioner's view, violates the fourteenth amendment. This Court has ruled that a driver's license is an entitlement which may not be terminated without due process of law. *Bell v. Burson*, 402 U.S. 535 (1971). However, Minnesota's statutory scheme clearly provides for full procedural protection before a license may be revoked.

The arguments petitioner raises with respect to a denial of equal protection of the laws were raised below and decided adversely to him. The court, at 207 N.W. 2d 542, held that there was "nothing in the record" to support the equal protection claims. We submit that this view is manifestly correct.

CONCLUSION

The petition, with its numerous disjointed arguments, raises no substantial federal question and should be denied.

Respectfully submitted,

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APPENDIX

Minn. Stat. § 169.123 (1969), in its entirety:

169.123 CHEMICAL TESTS FOR INTOXICATION. Subdivision 1. Peace officer defined. For purposes of Laws 1961, Chapter 454, the term peace officer means a state highway patrol officer or full time police officer of any municipality or county having satisfactorily completed a prescribed course of instruction in a school for instruction of persons in law enforcement conducted by the university of Minnesota or a similar course considered equivalent by the commissioner of public safety.

Subd. 2. Implied consent; conditions; election as to type of test. Any person who drives or operates a motor vehicle upon the public highways of this state shall be deemed to have given consent subject to the provisions of Laws 1961, Chapter 454, to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood. The test shall be administered at the direction of a peace officer, when (1) the officer has reasonable and probable grounds to believe that a person was driving or operating a motor vehicle while said person was under the influence of an alcoholic beverage, and (2) the said person has been lawfully placed under arrest for alleged commission of the said described offense in violation of Minnesota Statutes, Section 169.121, or an ordinance in conformity therewith. No action shall be taken hereunder against the said person unless the two enumerated conditions existed at the time the officer requested the chemical test specimen. Any person may decline to take a direct blood test and elect to take either a breath, or urine test, whichever is available, in lieu thereof, and either a breath or urine test shall be made available to the arrested person who makes such an election. No action shall be taken against the

person for declining to take a direct blood test unless either a breath, or urine test was available. At the time the peace officer requests such chemical test specimen, he shall inform the arrested person that his right to drive may be revoked or denied if he refuses to permit the test and that he has the right to have additional tests made by a person of his own choosing.

Subd. 3. Manner of making test; additional tests. Only a physician, or a medical technician, or registered nurse acting at the request of a peace officer may withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a breath, or urine specimen. The person tested shall have the right to a physician, or a medical technician, or registered nurse of his own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer; provided, that the additional test specimen on behalf of said person be obtained at the place where such person is in custody and at no expense to the state. Said person shall have the right to immediately communicate with his attorney, doctor or any other person in order to secure a physician, medical technician or registered nurse, for the purpose of administering such additional test or tests; but this shall in no way delay the administering of the test at the direction of the peace officer. The failure or inability to obtain an additional test or tests by a person shall not preclude the admission in evidence of the test taken at the direction of a peace officer unless the additional test was prevented or denied by the peace officer. Upon the request of the person who is tested, full information concerning the test or tests taken at the direction of the peace officer shall be made available to him. The physician, medical technician or registered nurse drawing blood at the request of a peace officer for the purpose of determining alcoholic content

shall in no manner be liable in any civil or criminal action except for negligence in drawing the blood. The person administering such test at the request and direction of such peace officer shall be fully trained in the administration and interpretation of such tests pursuant to standards promulgated by rule by the commissioner of public safety.

Subd. 4. Refusal to permit test; revocation of license. If a person under arrest refuses to permit chemical testing, none shall be given, but the commissioner of public safety, upon the receipt of a certificate of the peace officer that he had reasonable and probable grounds to believe the arrested person had been driving or operating a motor vehicle upon the public highways while under the influence of an alcoholic beverage, and that the person had refused to permit the test, shall revoke his license or permit to drive and any nonresident operating privilege for a period of six months. If the person is a resident without a license or permit to operate a motor vehicle in this state, the commissioner of public safety shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation, subject to review as hereinafter provided.

Subd. 5. Notice of revocation or determination to deny; request for hearing. No revocation under subdivision 4 shall be made until the commissioner of public safety notifies the person by certified or registered mail of the intention to revoke and allows said person a 20 day period after the date of receiving said notice to request of the commissioner of public safety, in writing, a hearing as herein provided. If no request is filed within the 20 day period the commissioner of public safety may then issue an order of revocation. However if a request for hearing is filed, no revocation hereunder shall be made until final judicial determination resulting in an adverse decision to said person.

Subd. 6. Hearing. The hearing shall be before a municipal judge, or probate judge if no municipal judge is available, learned in the law, in the county where the arrest occurred, unless there is agreement that the hearing may be held in some other county. The hearing shall be recorded and proceed as in a criminal matter, without the right of trial by jury, and its scope shall cover the issues of whether the peace officer had reasonable and probable grounds to believe the person was driving or operating a motor vehicle while under the influence of an alcoholic beverage; whether the person was lawfully placed under arrest; whether he refused to permit the test, and if he refused whether he had reasonable grounds for refusing to permit the test; and whether at the time of request for the test the peace officer informed the said person that his right to drive might be revoked or denied if he refused to permit the test and of his right to have additional tests made by a person of his own choosing. The municipal court shall order either that the revocation or denial be rescinded or sustained and refer such order to the commissioner of public safety for his further action.

Subd. 7. Review by district court. If the revocation or denial is sustained, the person whose license or permit to drive, or nonresident operating privilege has been revoked or denied, may within 20 days after notice of the determination by the commissioner of public safety file a petition for a hearing of the matter in the district court in the county where the hearing pursuant to subdivision 6 was held unless there is agreement that the hearing may be held in some other county. The petition shall be filed with the clerk of the said court together with proof of service of a copy thereof on the commissioner of public safety. It shall be the duty of the court to set the matter for hearing on a day certain with reasonable notice

thereof to the parties. The matter shall be heard de novo with a right of trial by jury.

Subd. 8. Notice of action to other states. When it has been finally determined that a nonresident's privilege to operate a motor vehicle in this state has been revoked or denied, the commissioner of public safety shall give information in writing of the action taken to the official in charge of traffic control or public safety of the state of the person's residence and of any state in which he has a license.